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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 869

NICHOLAS GUIDO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Nicholas Guido, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURTS BELOW.

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on May 2, 1957 and is not reported.

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgment, was filed January 3, 1958 and is included in the Appendix hereto and in the certified copy of the record.

JURISDICTION.

On February 20, 1958 it was ordered that the petition for rehearing be denied. This petition is filed within 30 days of the denial of the petition for rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1), 62 Stat. 928.

QUESTIONS PRESENTED.

1. Was it not reversible error for the Trial Court to refuse to sustain a pretrial motion, renewed during the course of the trial, to suppress evidence obtained as a result of a search of a safety deposit box rented by the petitioner under an assumed name shortly after the commission of the offense and his deposit therein of $3,150.00?

2. Was it not reversible error for the Court of Appeals to hold, as did the Trial Court, that shoes seized in an apartment at the time of the petitioner's arrest came within the scope of Rule 41(b) of the Federal Rules of Criminal Procedure and were the means of commission of an offense?

3. Was it not reversible error for the Court of Appeals to hold, as did the Trial Court, that considering the Government's burden of proving your petitioner guilty beyond a reasonable doubt, the evidence was sufficient to sustain a verdict of guilty?

STATEMENT OF THE CASE.

Your petitioner was charged in a single count indictment with a violation of Section 2113 of Title 18 of the United States Code, that is to say, of the crime of bank robbery. The indictment charged that Guido, with unknown persons, on November 4, 1955 at Maywood, Illinois,

by force, violence and intimidation, feloniously took approximately $21,906.82 from the Maywood-Proviso State Bank, the deposits of which bank were insured by the Federal Deposit Insurance Corporation. The petitioner was found guilty by a verdict of a jury and from a judgment entered thereon, appealed to the Court of Appeals for the Seventh Circuit, wherein the judgment was affirmed with one judge dissenting.

The Government to sustain its burden of proof in the Trial Court introduced testimony by employees of the bank that on the date in question three masked robbers entered the bank with machine guns and took the sum of money set out in the indictment. One of the robbers climbed up on a marble counter in the bank. Seventy-one days later your petitioner was identified as having passed five $2.00 bills which were identified as being part of the proceeds of the robbery. There was testimony that a heel print of a shoe seized in the apartment where the petitioner was arrested was similar to a heel print found on the marble counter in the bank. The petitioner, testifying in his own behalf, denied participation in the robbery and stated that he was elsewhere at the time of the commission of the offense and was supported in this alibi by the testimony of two other witnesses. In rebuttal, the Government produced a witness whose testimony was in conflict with that of the petitioner and his alibi witnesses as to his whereabouts at the time of the commission of the offense.

STATUTE CONCERNED.

Section 2113, Title 18, United States Code.

REASONS FOR GRANTING WRIT.

1. The Court of Appeals has decided an important federal question in a way in conflict with applicable decisions of this Court.

2. The Court of Appeals has rendered a decision in conflict with decisions of other Courts of Appeal.

3. The Court of Appeals has departed far from the accepted and usual course of judicial proceedings and has sanctioned such a departure by the District Court so as to call for an exercise of this Court's power of supervision.

We shall address ourselves *seriatim* to the above numbered reasons. We shall make our presentation as succinctly as possible.

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1. On January 19, 1956, two days after the arrest of the petitioner, Special Agents of the Federal Bureau of Investigation, acting under the authority of a search warrant issued by the Trial Judge, searched a Safety Deposit Box No. 6728 in the Pioneer Trust and Savings Bank in Chicago, which box had been rented by the petitioner under the name of Don Schiavone. They then took from this box $3,150.00 in United States currency. The search warrant was obtained upon the affidavit of Ross T. Spencer, assigning as grounds for the warrant's issuance the following:

> "That Don Schiavone (also known as Nicholas Guido, has been identified as possessing and passing currency stolen from said bank and that *information derived from an informer* (emphasis supplied) is that the proceeds of above bank robbery are in the said Safety Deposit Box; further, the box in the name of Don Schiavone has been recently rented in said bank by a man answering the physical description of Don Schiavone, alias Nicholas Guido."

Amendment IV to the United States Constitution is definite in its statement that no search warrant shall issue "but upon probable cause supported by oath or affirmation * * *", and Rule 41(c) of the Federal Rules of Criminal Procedure provides that:

> "A warrant shall issue only on affidavit sworn to before the Judge or Commissioner and establishing the grounds for issuing the warrant * * *".

Thus, in order to have a valid warrant, it must be made to appear by affidavit in this case that the box contained property stolen in violation of the laws of the United States (Rule 41, Federal Rules of Criminal Procedure, section (b) (1)). It is patent that the affidavit on which the instant warrant was issued, sets forth the only facts which would give rise to a belief that the box contained stolen property were facts which affirmatively appear from the face of the affidavit to be hearsay to the affiant.

Three alleged facts are set up by the affidavit. The first of these is that Schiavone, alias Guido, had been identified as possessing and passing currency stolen from the Maywood-Proviso State Bank. It requires no argument that such an allegation would not support the issuance of a search warrant directed against his effects and property. Another fact stated by the affidavit is that the box in the name of Schiavone had been recently rented in the Pioneer Trust and Savings Bank by a man answering the description of the petitioner. This fact also would not give rise to probable cause to believe that such box contained property stolen in violation of the laws of the United States. Beyond these two facts, nothing in the affidavit appears to be stated upon the knowledge of the affiant, Special Agent Spencer. The only allegation in the affidavit which, if true, would give rise to grounds

for issuance of the warrant is "that the proceeds of above bank robbery are in said safety deposit box", but such allegation affirmatively and definitely appears to be based on information which has been derived from an informer. The affidavit for that matter fails to as much as furnish the name of the informer, who supplied the only basis upon which a search warrant might validly issue.

It has been repeatedly held that the evidence which must be presented by the affidavit, must be competent evidence within the knowledge of the affiant and cannot be hearsay or rumor. It is readily conceded that the showing made upon the affidavit need not be such as would sustain a conviction, nor for that matter even amount to creation of probable cause of guilt, but such permissible relaxation in the quantum of proof required does not change the strict and inflexible rule that the evidence presented by affidavit be competent evidence falling within the personal knowledge of the affiant. To hold otherwise would render the requirement of an affidavit a nullity, since an affiant might always defend against a charge of making a false oath by showing the receipt of hearsay evidence he had received from parties who had not made affidavits in support of the application for the search warrant.

The question thus is not one as to the quantity of evidence that need be submitted to the issuing authority, but is one of the character or quality of such evidence. It is true that the evidence need not be such as to convince the Court of the existence of probable cause, but nevertheless it must be such evidence as would be competent and admissible before the jury, and upon which perjury for untruth, may be predicated.

In *Grau* v. *U. S.*, 287 U.S. 124, at 128 (77 L. Ed. 212, at p. 215) the Supreme Court of the United States laid down the rule that

> "A search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury *(Giles* v. *U. S.*, (CCA, 1st), 284 Fed. 208; *Wagner* v. *U. S.* (CCA 8th) 8 Fed. (2d) 581); and would lead a man of prudence and caution to believe that the offense had been committed. *Steele* v. *U. S.*, 267 U.S. 498, 504, 69 L. Ed. 757, 760."

It is submitted respectfully that the foregoing illustrates that the opinion of the Court of Appeals is in direct conflict with applicable decisions of this Court.

2. A Motion to Suppress as evidence certain articles, seized at the time of the petitioner's arrest at 1110 South Austin Boulevard, Oak Park, Illinois, was overruled by the Trial Court (App. 218). This motion was made by the defense after Agents of the Federal Bureau of Investigation had testified concerning the circumstances leading up to the arrest of the petitioner and was particularly directed against the introduction into evidence of Government's Exhibits 12 and 12A, which consisted of a pair of shoes, without which evidence the case of the Government would have utterly failed.

It is axiomatic that arresting officers are without authority to seize articles and property when making a search without a search warrant, which articles or property could not have been lawfully taken had the search been made under a validly issued warrant.

Rule 41(b) of the Federal Rules of Criminal Procedure states:

> "(b) Grounds For Issuance. 'A warrant may be issued under this rule to search for and seize any property (1) stolen or embezzled in violation of the

laws of the United States, (2) *designed or intended for use or which has been used as the means for committing a criminal offense;* (3) possessed, controled, or designed or intended for use of which is or has been used in violation of Title 18, U.S.C., 957.'" (Emphasis supplied).

Clearly, Government's Exhibits 12 and 12A (the shoes) cannot be contended to be property "stolen or embezzled in violation of the laws of the United States", nor "possessed, controled, or designed for use in violating any penal statute, or any of the rights or obligations of the United States under any treaty or law of nations". Therefore, if the same are lawfully admissible, it must be on the basis that the shoes were "designed or intended for use or had been used *as the means* of committing a criminal offense". (Emphasis supplied).

Obviously, the shoes were of great and, for that matter, controlling value in the Government's case. Also, that they were worn by the petitioner in his alleged robbery of the Maywood-Proviso Bank is the precise point which the Government seeks to make by their use. Their evidentiary value was thus great. This fact, however, does not transmute them into belonging to a class of property into which they simply do not fall. It must be noted that the rule does not permit the seizure of articles merely because they have *been used* in the commission of a criminal offense. It requires that the articles be used as *the means* thereof.

In support of this argument, the Court's attention is respectfully directed to *Gouled* v. *United States,* 255 U.S. 298, at p. 308: (65 L. Ed. 647, at p. 652)

> "The wording of the 4th Amendment implies that search warrants were in familiar use when the Constitution was adopted, and, plainly, that when issued 'upon probable cause, supported by oath or affirmation,

and particularly describing the place to be searched and the persons or things to be seized,' and seizures made under them are to be regarded as not unreasonable, and therefore not prohibited by the Amendment. Searches and seizures are as constitutional under the Amendment when made under valid search warrants as they are unconstitutional, because unreasonable, when made without them,—the permission of the Amendment has the same constitutional warrant as the prohibition has, and the definition of the former restrains the scope of the latter. All of this is abundantly recognized in the opinions of the *Boyd* Case, 116 U.S. 616, 29 L. Ed. 746, 6 Sup. St. Rep. 523, and the *Weeks* case 232 U.S. 383, 58 L. Ed. 652, L.R.A. 1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1177, in which it is pointed out that, at the time the Constitution was adopted, stolen or forfeited property, or property liable to duties, and concealed to avoid payment of them, excisable articles, and books required by law to be kept with respect to them, counterfeit coin, burglars' tools and weapons, implements of gambling, 'and many other things of like character,' might be searched for in home or office, and, if found, might be seized, under search warrants lawfully applied for, issued, and executed.

"Although search warrants have thus been used in many cases ever since the adoption of the Constitution, and although their use has been extended from time to time to meet new cases within the old rules, nevertheless it is clear that, at common law and as the result of the *Boyd* and *Weeks* Cases, *supra*, they may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession

of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful, and provides that it may be taken. *Boyd* Case, 116 U.S. 623, 624, 29 L. Ed. 748, 6 Sup. Ct. Rep. 524."

In the same connection, the Supreme Court in *Lefkowitz* v. *United States,* 285 U.S. 452, at p. 461 (76 L. Ed. 877 at p. 882) stated as follows:

"The only question presented is whether the searches of the desks, cabinet and baskets and the seizures of the things taken from them were reasonable as an incident of the arrests. And that must be decided on the basis of valid arrests under the warrant. Save as given by that warrant and as lawfully incident to its execution, the officers had no authority over respondents or anything in the room. The disclosed circumstances clearly show that the prohibition agents assumed the right contemporaneously with the arrest to search out and scrutinize everything in the room in order to ascertain whether the books, papers or other things contained or constituted evidence of respondents' guilt of crime, whether that specified in the warrant or some other offense against the Act. Their conduct was unrestrained. The lists printed in the margin show how numerous and varied were the things found and taken.

"The 4th Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy. *Byars* v. *United States,* 273 U.S. 28, 32, 71 L. Ed. 520, 523, 47 S. Ct. 248. Its protection extends to offenders as well as to the law abiding. *Weeks* v. *United States,* 232 U.S. 383, 58 L. Ed. 652, L.R.A. 1915B, 834, 34 S. Ct. 341, Ann. Cas. 1915C, 1177; *Agnello* v. *United States,* 269 U.S. 20, 32, 70 L. Ed. 145, 148, 51 A.L.R. 409, 46 S. Ct. 4. The authority of officers to search one's house or

place of business contemporaneously with his lawful *arrest therein upon a valid warrant of arrest certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained.* Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime. *United States* v. *Kirschenblatt* (C.C.A. 2d) 51 A.L.R. 416, 16 F. (2d) 202, 203; *Go-Bart Importing Co.* v. *United States, supra.*

"Respondents' papers were wanted by the officers solely for use as evidence of crime of which respondents were accused or suspected. They could not lawfully be searched for and taken even under a search warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were. *Gouled* v. *United States,* 255 U.S. 298, 310, 65 L. Ed. 647, 653, 41 S. Ct. 261.

". . . Here, the searches were exploratory and general and made solely to find evidence of respondents' guilt of the alleged conspiracy or some other crime. Though intended to be used to solicit orders for liquor in violation of the Act, the papers and other articles found and taken were in themselves unoffending. The decisions of this court distinguish searches of one's house, office, papers or effects merely to get evidence to convict him of crime from searches such as those made to find stolen goods for return to the owner, to take property that has been forfeited to the Government, to discover property concealed to avoid payment of duties for which it is

liable, and from searches such as those made for the seizure of counterfeit coins, burglar's tools, gambling paraphernalia and illicit liquor in order to prevent the commission of crime. *Boyd* v. *United States*, 116 U.S. 616, *et seq.*, 79 L. Ed. 746, 6 S. Ct. 524; *Weeks* v. *United States*, 232 U.S. 383, 395, 58 L. Ed. 652, 656, L.R.A. 1915B, 834, 34 S. Ct. 341, Ann. Cas. 1915C, 1177; *Gouled* v. *United States, supra*, *Carroll* v. *United States, supra.*"

3. Despite the length of the record in the case at bar, and the substantial number of witnesses who testified, it can be categorically stated that no evidence whatsoever was received which in any wise tended to connect the petitioner with the robbery of the Maywood-Proviso State Bank charged in the indictment, save and except the following items of circumstantial evidence:

1. Seventy-one days after the robbery the petitioner had in his possession and used in the purchase of goods and services at Sears, Roebuck Department store in Chicago five $2.00 bills which were taken from the robbed bank;

2. In the apartment in which he was placed under arrest were found a pair of shoes, the left heel of which made an imprint similar to that found on the counter of the robbed bank.

Viewing this evidence, as we must, in a light most favorable to the prosecution, and totally disregarding the evidence adduced by the defense, in a case as close as this where a great mass of incompetent evidence was heard by the jury, it is respectfully submitted that the Court erred in permitting the matter to be decided by a jury, and it is respectfully submitted that the Court of Appeals should have adopted the dissent as the decision of the Court for the reasons stated therein.

CONCLUSION.

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

RICHARD E. GORMAN,
JOSEPH E. GREEN,
Attorneys for Petitioner.

APPENDIX.

In The

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

No. 12090 SEPTEMBER TERM AND SESSION, 1957

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
NICHOLAS GUIDO,
Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

January 3, 1958

Before DUFFY, *Chief Judge*, and MAJOR and PARKINSON, *Circuit Judges.*

DUFFY, *Chief Judge.* By the verdict of a jury, defendant was convicted under a single count indictment of the crime of bank robbery. He was sentenced to imprisonment for a term of five years.

On November 4, 1955, the Maywood-Proviso State Bank, Maywood, Illinois, was robbed of approximately $22,000.00 by three robbers. The deposits were insured by the Federal Deposit Insurance Corporation. The robbers were masked and brandished machine guns during the course of the robbery. One of the robbers climbed up on a marble counter in the bank. The rubber heel which was a part of one of the shoes which he wore made a distinct and plainly visible print on the counter. F.B.I. agents made a number of pictures of the heel print, some of which were received in evidence.

Errors relied on consist of the trial judge's refusal to suppress evidence obtained as a result of a search of defendant's safety deposit box; refusal of the trial judge to suppress evidence obtained in the search of an apartment which was made at the time of the defendant's arrest; that much incompetent and irrelevant evidence was received which was prejudicial to the defendant although such evidence was later stricken; alleged improper evidence received on rebuttal and denial by the trial court of defendant's motion for acquittal.

Two days after the arrest of defendant, special agents of the F.B.I. obtained a search warrant from the trial judge and searched a safety deposit box in the Pioneer Trust and Savings Bank in Chicago, which box had been rented by defendant under the name of Don Schiavone. Currency in the amount of $3,150.00 was taken from the box. Relying upon *Grau* v. *United States,* 287 U.S. 124, defendant insists that the affidavit upon which the search warrant was obtained, was insufficient because it was, in part, based upon evidence that would be hearsay if offered at the trial.

The only hearsay evidence referred to in the affidavit was that an informer had supplied the information that some of the currency stolen from the Maywood-Proviso Bank was in Safety Deposit Box no. 6728. However, the affidavit stated from personal knowledge that defendant had been identified as possessing and passing currency stolen from the Maywood-Proviso State Bank; that defendant Guido was also known as Don Schiavone, and that a man named Don Schiavone answering the description of defendant Guido had recently rented Safety Deposit Box No. 6728.

Under Rule 41, Federal Rules of Criminal Procedure, the judge issuing the search warrant must be "* * * satisfied that grounds for the application exist or that there is probable cause to believe that they exist * * *." If so satisfied, he is empowered to issue the warrant.

Insofar as the *dictum* in *Grau* v. *United States,* 287 U.S. 124, 128, may be said to uphold the view here es-

poused by the defendant, we think it has been repudiated by the later case of *Brinegar* v. *United States*, 338 U.S. 160, 174.[1] We hold the affidavit was a sufficient basis for the issuance of the warrant authorizing the search of the safety deposit box, and that the judge did not abuse his discretion in issuing the search warrant.

The bases for the motion to suppress as evidence certain articles seized at 1110 South Austin Blvd., Oak Park, Illinois, upon the occasion of defendant's arrest were a) that defendant's arrest was one of convenience, and b) that Government Exhibits 12 and 12-A (a pair of defendant's shoes) cannot be considered "means of committing a criminal offense."

It is true that there were a number of F.B.I. agents who had the apartment at 1110 South Austin Blvd. under surveillance on the day of defendant's arrest. Yet, only two agents saw defendant just before he entered the apartment. They saw him in traffic only momentarily, and then lost sight of him. When they again located defendant's Cadillac, it was parked in front of 1110 South Austin Blvd., and the driver was no longer in the car. There is no evidence in the record to substantiate defendant's claim that his arrest was one of convenience.

Rule 41(b), Federal Rules of Criminal Procedure, states in part: "(b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property 1) Stolen or embezzled in violation of the laws of the United States; or 2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; * * *" The rule further states: (g) The term 'property' is used in this rule to include documents, books, papers and any other tangible objects."

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[1] In *Brinegar*, footnote 13 of the opinion stated: "But see, *e.g. Grau* v. *United States*, 287 U.S. 124, 128, in which it was said by way of *dictum* that 'A search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury. * * *' For this proposition there was no authority in the decisions of this Court. * * * The statement has not been repeated by this Court."

Defendant argues that articles are not "the means" of committing an offense merely because they have been used in the commission of an offense. If, during a robbery, a robber had a gun in his hand, and wore a mask and gloves, the latter to prevent finger prints, defendant, apparently, would concede that such articles could be seized in a search incidental to a lawful arrest. However, defendant insists that shoes worn during a robbery do not come within that category.

It is not logical to place in different categories a mask and a hat which might have been worn and pulled down upon the face of the robber to make identification more difficult. It is likewise difficult to place in different categories a pair of gloves worn on the hands and a pair of shoes worn on the feet. Surely, the latter would facilitate a robber's get-away and would not attract as much public attention as a robber fleeing barefooted from the scene of the hold-up.

In *Harris* v. *United States*, 9 Cir., 151 F. 2d 837 the Court commented, page 840: "'The line between fruit of the crime itself and mere evidence thereof may be narrow' and perhaps turn more on the good faith of the search than the actual distinction between 'fruits' and 'evidence.'" We think this is a sound observation.

It is well established that a search cannot be upheld which is merely exploratory and made solely to find evidence of guilt. *United States* v. *Lefkowitz, et al.*, 285 U.S. 452, 465, and *Go-Bart Importing Company, et al.*, v. *United States*, 282 U.S. 344. Where a search warrant was obtained for specifically described papers which admittedly had evidentual value only, the search was held to be invalid. *Gouled* v. *United States*, 255 U.S. 298. However, in *Marron* v. *United States*, 275 U.S. 192, where a ledger and utility bills were seized, it was held that they were means of committing a crime, namely, the operation of a saloon. In *Morton* v. *United States*, DC Cir., 147 F. 2d 28, cert. den. 324 U.S. 857, the court approved admitting into evidence a blood-stained shirt and trousers found in defendant's closet in a case where murder was the charge.

Admittedly, there has been some confusion in the language used by different courts as to what kind of articles may be seized incidental to an arrest of a defendant. However, in the case at bar, we hold the arresting officers were entitled to seize the pair of defendant's shoes and that same were properly received into evidence at the trial. We hold the arrest was not made as an excuse for a general exploratory search.

As a basis for our holding, we think well worth repeating the statement made by this Court in *United States v. Pisano, et al.* 7 Cir., 193 F. 2d 361, 363: "Under the Fourth Amendment of the Constitution the people are protected from unreasonable searches * * * Searches and seizures incidental to an arrest but without search warrants are not necessarily unreasonable but are, in the absence of unusual circumstances, entirely reasonable. The right to search the place where the arrest is made and to find and seize things connected with the crime as its fruits or as the means by which it is committed stems not only from the authority to search the person but also from the long standing practice of searching for other proofs of guilt within the control of the accused upon arrest. *Weeks* v. *United States*, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652. Consequently the premises where a valid arrest is made, under the control of the person arrested, are subject to search without a search warrant. Such a search is not unreasonable. * * * The only essential of validity of a search incidental to an arrest is that it be made in connection with a valid arrest. * * *"

Defendant insists that much incompetent and irrelevant evidence was received with reference to the contents of his lock box and although the Court later struck same from the record, that it was, nevertheless, prejudicial. The Government undoubtedly was disappointed in the testimony of a woman bank teller who identified pencilled notations she had made on four $50.00 bills, and which bills were found in defendant's lock box. She first said she made the notations upon the day of the robbery, but upon cross examination, she was not certain of the date.

The trial court then denied defendant's offer of the bills into evidence. However, much of her testimony remained, such as that a packet of twenty-five $2.00 bills was taken from her cage by one of the robbers.

Some of the testimony which defendant says was prejudicial although later stricken, was testimony to which he stipulated. However, the Court promptly admonished the jury to disregard the testimony which was stricken and also gave adequate instructions with reference thereto. No request by defendant to admonish the jury was denied during the trial. No requested instruction to disregard portions of the testimony was denied. We hold there was no error in this respect.

Defendant argues that evidence received in rebuttal was improper and prejudicial. Defendant had attempted to establish an alibi by testifying on the trial that he was in the Roxy Movie Theatre across the street from his apartment on the evening of the robbery. He specified that he was in the theatre watching a movie entitled "To Catch a Thief" from about 6:00 P.M. to 8:30 or 9:30 P.M. Other testimony established that the robbery occurred about 6:22 P.M. Defendant also denied on the trial that he had made certain statements to F.B.I. agents such as that he had spent the night in question in another location.

On rebuttal, the Government offered evidence of F.B.I. agents as to statements which the defendant had made to them and which he had denied upon the trial. Testimony was also introduced which, if believed by the jury, completely demolished the alibi which the defendant had so carefully built up. We think all of such evidence was proper and no error was committed by receiving same.

The last and probably the most important point argued by defendant is that the evidence adduced by the Government was insufficient to sustain a judgment of conviction. We have read the long record containing the testimony in this case. Having in mind that the jury was the sole judge of the credibility of the witnesses, and that the

experienced trial judge had observed these witnesses, we think the Court properly denied defendant's motion for acquittal, and that the jury's verdict of guilty, and the judgment of conviction thereon, must be upheld.

The evidence must, of course, be viewed in the light most favorable to the Government. *United States* v. *Detente*, 7 Cir., 199 F. 2d 286. When so viewed, we hold there is substantial evidence to support the judgment of conviction.

It was clearly established that the rubber heel of one of the shoes found in defendant's closet upon the occasion of his arrest was the heel which left a clear imprint on a marble counter in the bank. It was also established that one of the robbers in going from one cage in the bank to another, stepped upon the counter in question. Although the defendant did not specifically admit that the shoes were his, he did say "Well, they might be mine," and under the circumstances of their location, it was a permissible inference for the jury to make that the shoes belonged to the defendant and were worn by him on the day of the robbery.

Two packets of twenty-five $2.00 bills were taken from the Bank during the robbery. The Bank had a record of the serial number of each of said bills, and this record was introduced into evidence. It was proved that defendant used five of the bills stolen from the Bank in making purchases from a Sears Roebuck & Co. store. The purchases were in five separate departments of the store, and defendant used only one bill in making each of said purchases. True, defendant told a story of winning these bills by gambling. However, the jury who knew that defendant had twice previously served prison terms for larceny, and who were the sole judges of his credibility, just didn't believe his story.

The jury also was entitled to consider the elaborate alibi which defendant attempted to build only to have it demolished by rebuttal witnesses. Undoubtedly, in the eyes of the jury, the defendant was entirely discredited.

It must be granted that the quantity of proof showing defendant's built is not great. But it is typical of the evidence that would be available in any robbery where the perpetrators were hooded or otherwise masked, and who made a get-away without trace. The volume of evidence in this case may not be great, but its quality is high. We hold the Government sustained the burden of proof which was upon it, and that the judgment of conviction must be and is

AFFIRMED.

MAJOR, *C. J., dissenting.* I feel obliged to dissent and shall briefly state my reasons therefor. I agree that a search warrant was properly issued for the search of defendant's safety deposit box in the Maywood-Proviso Bank. I also agree that the search of defendant's apartment incidental to his arrest was proper. I part company, however, with the statement, "The volume of evidence in this case may not be great, but its quality is high." In my view, the volume of evidence is meager and its quality inferior. The weakness of the government's case is at once apparent from the fact that it dwells upon how it demolished defendant's alibi. Of course, the validity of that defense was for the jury, but whether true or false it was without probative value in support of the bank robbery charge.

The sole affirmative proof relied upon by the government consists of two circumstances. The first is that defendant passed five $2 bills in a Sears, Roebuck & Company store, which were identified as having been stolen from the bank in the robbery. Thus, of fifty $2 bills stolen, five were found in possession of defendant. The significant fact regarding this possession, however, which renders it of little or no value, is that the bank was robbed November 4, 1955, and the five $2 bills were found in possession of defendant on January 14, 1956, seventy-one days after the robbery.

The second circumstance relates to the so-called rubber heel imprint testimony. An F.B.I. agent assigned to the

F.B.I. laboratory in Washington concluded that the imprint on the counter in the robbed bank was made by the heel of the shoe found in defendant's apartment. The testimony of this witness is, in my view, far from conclusive, particularly in view of the fact that the government had no direct proof that the shoe belonged to defendant. This essential link had to be inferred from the fact that the shoe was found in defendant's apartment seventy days after the robbery.

Weak as the government's proof was, however, I agree, with some hesitation, that it was sufficient to take the case to the jury and that its verdict should be respected, providing the trial was free from prejudicial error. This, in my view, was not the case. The record reeks with testimony heard by the jury which cannot be characterized as other than prejudicial, even though it was subsequently stricken. For my purpose it is sufficient to refer only to that which had its genesis in the search made of defendant's bank box which admittedly was rented by defendant under an assumed name on January 14, 1956, seventy-one days after the robbery. As a result of the search of this bank box, $3,150 was seized. This money was produced in court by the government, displayed before the jury and a mass of testimony heard relative thereto. This testimony was offered evidently with the intention of identifying it or some of it with the money seized in the robbery. However, after the jury had witnessed the display and listened to this testimony, it developed that the government was unable to make identification. In fact, the testimony of the witness relied upon for this purpose was characterized by the court as "incredible." Thereupon, the testimony of this witness, as well as that of all other witnesses, concerning the money found in defendant's bank box, was stricken and the jury was specifically instructed by the court both at that time and subsequently to disregard it.

The trial judge did all that was possible to ameliorate the damaging effect of this testimony by admonishing the

jury to disregard it. That the court succeeded is, in my judgment, highly improbable, particularly in view of the meager proof relied upon by the government. The situation calls for a reversal "unless it *affirmatively* appears from the whole record that it was not prejudicial." *McCandless et al.* v. *United States*, 298 U.S. 342, 347. The record furnishes no basis for such a belief.

We are told that the government was disappointed in the testimony of its witness by whom it attempted, but failed, to made identification. I do not doubt that such was the case but this disappointment cannot be utilized to impair defendant's right to a trial free from prejudicial error. In cases where proof of guilt is strong and convincing, it may be that a reviewing court can say, as often has been done, that an error made during the course of the trial could not have affected the result and is, therefore, not prejudicial. There is no justification, however, in my opinion, for the application of such a theory in the instant case.

I would reverse and remand for a new trial.

BRIEF FOR THE U.S. IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 869

NICHOLAS GUIDO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a–8a) is reported at 251 F. 2d 1.

JURISDICTION

The judgment of the Court of Appeals was entered on January 3, 1958 (Pet. App. 8a). A petition for rehearing was denied on February 20, 1958. The petition for a writ of certiorari was filed on March 22, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner was prejudiced by stricken testimony which the court instructed the jury to disregard.

2. Whether shoes suspected of having been worn by a robber could properly be seized incidental to a valid arrest.

STATEMENT

On May 2, 1957, in the United States District Court for the Northern District of Illinois, petitioner was convicted under a single-count indictment (R. 3) charging armed bank robbery in violation of 18 U. S. C. 2113 (R. 479–480). He was sentenced to imprisonment for 5 years (R. 483–484).

The bank in question was robbed of approximately $22,000 on November 4, 1955, by three masked men armed with a machine gun (R. 21–34).

Petitioner was arrested at his home under a warrant by agents of the Federal Bureau of Investigation (R. 78–85, 86–91, 129–138, 141–147, 152–166, 178–194). Among the articles seized in a search incidental to the arrest was a pair of shoes which petitioner, at the time, admitted might be his (R. 88–89). When asked if he had any objection to the seizure of the shoes, petitioner told the arresting officers, "You can take anything you want" (R. 88–89, 154).

Two days after the arrest, government agents obtained from the trial judge a warrant to search a safety deposit box (R. 11–12) rented by petitioner approximately two and a half months after the robbery (R. 3, 12, 276). The warrant was based upon an affidavit made by one of the agents which stated in pertinent part (R. 9–10):

> * * * That Don Schiavone (also known as Nicholas Guido), has been identified as possessing and passing currency stolen from said

bank and that information derived from an informer is that the proceeds of above bank robbery are in said Safety Deposit Box; further, a box in the name of Don Schiavone has been recently rented in said bank by a man answering the physical description of Don Schiavone, alias Nicholas Guido.[1]

Prior to trial, petitioner moved to quash the search warrant and suppress the contents of the safety deposit box on the ground that the facts alleged in the affidavit were hearsay (R. 5–8). The court found the facts and circumstances set forth in the affidavit legally sufficient to support the issuance of the warrant and denied the motion (R. 15).

At the trial, evidence was introduced that 71 days after the robbery petitioner made purchases with five $2.00 bills taken from the bank at the time of the robbery (R. 46–53, 150, 241–242). The bank had a record of the serial numbers on the $2.00 bills which were stolen and the bills in petitioner's possession were identified by those numbers (R. 21–34, 148, 168–171). Petitioner admitted the purchases and possession of some $2.00 bills but claimed he had won the money gambling (R. 321–322).

Evidence was also introduced that at the time of the robbery one of the robbers stepped on a marble counter in the bank leaving an imprint of the heel of his shoe (R. 36, 42, 239–240, 250, 253). There was evidence that the rubber heel of one of the shoes found in petitioner's home at the time of his arrest

[1] The informer was unknown to the government (R. 103).

was the same heel that left the imprint on the counter (R. 42–43, 219–237).[3]

When it appeared that the government was about to introduce evidence concerning the safety deposit box, the motion to suppress this evidence was renewed and argument was had thereon outside the presence of the jury (R. 92–109). The trial court again upheld the government (R. 108–109). One of the F. B. I. agents who participated in the search then testified that he and some other agents opened the box pursuant to the search warrant and took $3,150.00 from it (R. 110). He found five $10 bills with serial numbers in sequence except for one missing bill and four $50 bills with numbers penciled in the margins (R. 111–113). It was stipulated that petitioner was the man who rented the box (R. 175, 177).[4]

A teller in the robbed bank testified that she had marked the numbers on the four $50 bills and had seen them on the day of the robbery (R. 242–243). She did not testify as to when she had marked them. On cross-examination she admitted that she was not sure she had seen the bills on the date of the robbery, but she persisted in her testimony that she had marked the bills (R. 245–248).[5] The government

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[3] Petitioner moved to suppress the evidence relating to the pair of shoes in question. He recognized that fruits or results of a crime may be seized incidental to a lawful arrest, but contended, *inter alia*, that the shoes could not have been used as a means of robbing the bank (R. 201, 208). The court denied the motion to suppress (R. 218).

[4] All the money was thereupon returned to petitioner except for the four $50 bills and the five $10 bills (R. 176).

[5] Apparently the bank did not have a record of the serial numbers of the stolen bills, other than the $2 bills.

moved the admission of the bills (R. 255) and the question was argued out of the hearing of the jury. The judge said "her testimony was so unsatisfactory that I don't think I would be justified in letting the jury say whether or not they believe it" (R. 259). The court was concerned with the amount of money the numbers on the bills represented (R. 258, 260). Defense counsel argued that the numbers represented a total of approximately $40,000 whereas only about $22,000 was stolen from the bank. Government counsel maintained that there was no testimony that the numbers represented certain totals of cash on hand (R. 263) and argued that it was relevant that the bills were in the bank at any time and later found in petitioner's possession, particularly since he had four and not just one of the bills and was not known to be a customer of the bank (R. 259). The government further argued that the credibility of the witness was a question for the jury. The court nevertheless sustained the objection to the admission of the bills on the basis that the testimony of the teller was "incredible" (R. 265). The five $10 bills were likewise excluded (R. 149–150). Thereafter, the court denied a motion for a mistrial but admonished the jury in his own words, and additionally in words supplied by petitioner, to disregard all the testimony concerning the safety deposit box and the contents thereof (R. 280). In addition, the general charge to the jury included an instruction to the same effect (R. 456).

Petitioner's defense was that he was at a movie at the time of the crime (R. 292–297, 298–301).[1] The government's evidence in rebuttal contradicted this (R. 370–391).

The Court of Appeals unanimously upheld the propriety of the warrant to search petitioner's safety deposit box and the search of petitioner's apartment incidental to his arrest (Pet. App. 1a–8a). One judge dissented from the affirmance of the conviction on the ground that, although the government's proof was sufficient to take the case to the jury, it was too weak to prevent the evidence concerning the safety deposit box from prejudicially affecting the result.

ARGUMENT

1. Petitioner contends that the trial court erroneously denied his motions to suppress the evidence relating to the safety deposit box. He maintains that the search and seizure were unlawful because the warrant was not issued on probable cause. He asserts, as he unsuccessfully asserted in the courts below, that the only fact set out in the "affidavit for search warrant" which would justify its issuance was the statement "that information derived from an informer is that the proceeds of above bank robbery are in the said Safety Deposit Box," and that that statement was hearsay and thus could not serve as a basis for a warrant (Pet. 4–7).

When the trial court struck all evidence and testimony relating to the box and its contents and emphatically instructed the jury to disregard it on several

[1] He also testified on direct examination that he had twice previously been convicted of larceny (R. 310–311).

occasions, the question of the legality of the search and seizure was mooted.* The only issue raised by the introduction of evidence relating to the deposit box is whether it so prejudiced petitioner as to require a reversal of his conviction even though it was withdrawn from the consideration of the jury.

The majority of the Court of Appeals was correct, we submit, in holding that any error in admitting the testimony in question was cured by the trial court when it "promptly admonished the jury to disregard the testimony which was stricken and also gave adequate instructions with reference thereto." Since the trial court's instructions were clear and there were no circumstances present which would lead one to believe that the jury would not follow them, the law presumes that the jury did follow them in arriving at their verdict. *Delli Paoli* v. *United States*, 352 U. S. 232, 242; *Opper* v. *United States*, 348 U. S. 84, 95. See also *Lutwak* v. *United States*, 344 U. S. 604,

* In any event, there is no merit to petitioner's contention that the search warrant was unlawfully issued because there was no probable cause. The affidavit in support of the application for the warrant affirmatively represented that the bank had been robbed several months before, that petitioner had been identified as possessing and passing currency stolen from that bank, and that petitioner, under an assumed name, had recently rented a certain safety deposit box. In addition to these facts, the affidavit contained the hearsay statement that proceeds from the robbery were in that box. Petitioner contends that the latter statement could not be considered in determining probable cause because a search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury. This is not the law. *Brinegar* v. *United States*, 338 U. S. 160, 175–176. While the anonymous "tip" alone might not be sufficient, it together with the other established facts did show probable cause for search of the box.

615–620; *Blumenthal* v. *United States*, 332 U. S. 539, 553. As the Court of Appeals pointed out (Pet. App. 6a):

> Some of the testimony which defendant says was prejudicial although later stricken, was testimony to which he stipulated. * * * No request by defendant to admonish the jury was denied during the trial. No requested instruction to disregard portions of the testimony was denied. We hold there was no error in this respect.

The court further noted that there was other substantial evidence to support the conviction, specifically the evidence relating to the heel print and the $2.00 bills, concluding: "The volume of evidence in this case may not be great, but its quality is high" (Pet. App. 7a–8a).[1]

The dissenting judge, in concluding that the evidence relating to the bank box was prejudicial despite the clear instructions of the court, apparently assumed, on the basis of the ruling of the trial judge, that the evidence was, in fact, incompetent and irrelevant. Actually, although there was no positive proof that the marked money found in petitioner's box was stolen from the bank, the circumstances were such that the evidence was relevant and competent. The bank teller positively and unwaveringly maintained that she had marked the four $50 bills in the bank. The witness never testified on direct examination as to when she had marked them and the only

[1] This holding answers petitioner's present challenge to the sufficiency of the evidence (Pet. 12).

discrepancy in her testimony was that she stated, on direct examination, that she had seen the bills on the date of the robbery and then admitted, on cross examination, that she was not sure she had seen them on that day. That plus the fact that the $10 bills were in sequence was a circumstance which justified an inference that the bills came from the bank. The trial judge was therefore more favorable to the defense than necessary in characterizing the testimony as "unsatisfactory" and excluding it from the consideration of the jury.

2. Petitioner admits that the fruits or means of a crime may be seized incidental to a lawful arrest, but he contends, as he contended below, that the shoes seized incidental to his arrest should have been suppressed since they could not be considered a means used to commit the robbery.

As aptly stated by the Court of Appeals (Pet. App. 4a):

> Defendant argues that articles are not "the means" of committing an offense merely because they have been used in the commission of an offense. If, during a robbery, a robber had a gun in his hand, and wore a mask and gloves, the latter to prevent finger prints, defendant, apparently, would concede that such articles could be seized in a search incidental to a lawful arrest. However, defendant insists that shoes worn during a robbery do not come within that category.
>
> It is not logical to place in different categories a mask and a hat which might have been worn and pulled down upon the face of

> the robber to make identification more difficult. It is likewise difficult to place in different categories a pair of gloves worn on the hands and a pair of shoes worn on the feet. Surely, the latter would facilitate a robber's get-away and would not attract as much public attention as a robber fleeing barefooted from the scene of the hold-up.

Other case law establishes the cogency of this conclusion. This Court, for example, in *Marron* v. *United States,* 275 U. S. 192, 199, upheld the seizure, incidental to an arrest, of ledgers and utility bills of a saloon, stating "* * * if the ledger was not as essential to the maintenance of the establishment as were bottles, liquors and glasses, it was none the less a part of the outfit or equipment actually used to commit the offense." See also *Morton* v. *United States,* 147 F. 2d 28 (C. A. D. C.), certiorari denied, 324 U. S. 875, a murder case in which the court approved the admission into evidence of a blood-stained shirt and trousers found in the defendant's closet and seized incidental to his arrest. Cf. *United States* v. *Rabinowitz,* 339 U. S. 56, 61–62.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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